

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Bky No. 04-60106 RJK

In re:

Daniel S. Miller,

Debtor.

Daniel S. Miller,

Plaintiff,

Adv. No. 04-6043

vs.

Daniel Altepeter, Darral Altepeter, John Altepeter, Peter Anderson, Roger Anderson, Doug Barth, Chuck Bina, Bremer Bank National Association, Monte Casavan, Gregory Driscoll, Dubuque Farming Association, Emmert Farms, Farmers Coop Grain & Seed, Kyle Haake, Roger Hagen, Russ Halverson, Gary Hoper, J & J Gust Farms, J.O. Thorson Farm, Inc., JETN Farms LLP, Gorman Johnson, Loren Johnson, Walter Johnson, Dan Juneau, Joe Juneau, Charles Kaml, Key West Farms, KO-R Farms, Inc., K-Team, Gary Larson, Lonesome Land, Matco, Inc., David McCollum, McWalter Farms, Inc., James A. Narum, Bradley Nelson, Doyle Nelson, Jeremy J. Nelson, Patrick Noll, Erik Nymann, Nymann Farms, Ose Farms a/k/a Joseph T. Ose, Burl Peckman, Gary Peckman, Pederson Brothers, Peterson Farms, PM Farming, Inc., Hans Reinhardt, Darrold Rodahl, Larry Roisland, Gary Salentiny, Dennis Salentiny, Richard Salentiny, Andrew Spaeth, John Spina, Howard Steinmetz, Matt Thorson, Ronald Thorson, Tri-Mack Potato, Inc., United Grain & Livestock, Erwin Vanek, Dan Wichterman, Steven D. Wollin and Gregory Wollin.

Defendants.

**OBJECTION TO MOTION
BY TRI-MACK POTATO, INC.
FOR SUMMARY JUDGMENT**

Debtor, by its undersigned attorney, hereby objects to the granting of the relief requested in the motion by Tri-Mack Potato, Inc., (“Tri-Mack”) for summary judgment in that it is premature and there are unresolved fact issues that still exist. For instance:

1. Debtor entered into a lease agreement with Lonnie Jeffrey, Dale Jeffrey and Robert Geddes (the “Bin-Owners”) on August 4, 2003 (the “Lease”). The Lease contemplated 11 bins at the Jeffrey Site including bins 9, 10 and 11. Debtor did not sublease bins 9, 10 and 11 to Tri-Mack or cancel the Lease with the Bin-Owners. Accordingly, the August 26, 2004 consent to store agreement signed by Dale Jeffrey transferred no interest to Tri-Mack since Debtor held such rights. Indeed, Debtor had paid the rental fees on Jeffrey Bins 9, 10 and 11 as identified in the Affidavit of Donald Mack.

2. Tri-Mack delivered 13,927.96 bushels of wheat to the Jeffrey Site between August 7, 2003 and August 15, 2003. The parties contemplated sale of this wheat to Debtor. Although Tri-Mack pledged wheat from Jeffrey Bins 9, 10 and 11 to the CCC, it now appears Tri-Mack did not own all of the wheat pledged.

3. Brian R. Erickson, Larry Tack and Russ Halvorson delivered 5920.67 bushels of wheat to Jeffrey Bins 9, 10 and 11 on August 12 and 13, 2003 as evidenced by the scale tickets attached as Exhibit D to the Affidavit of Daniel S. Miller. Accordingly, a fact issue exists as to how much wheat Tri-Mack delivered to Jeffrey Bins 9, 10 and 11. On this basis alone the Court should deny Tri-Mack’s motion for Summary Judgment.

4. The CCC loan did not change the nature of the transaction with Debtor from a contract for sale to a contract for storage. The consent for storage/lien waiver was required by the CCC to verify that its security position would not be trumped by a storage lien but has no bearing on the relationship between Debtor and Tri-Mack.

5. Since the time Debtor originally filed its motion to abandon the Tri-Mack grain and proceeds on April 15, 2004, the existence of the conflicting lease and the scale tickets evidencing other producers' deposits into Jeffrey Bins 9, 10 and 11 have come to light. Accordingly, there is another fact issue as to whether or not there is a written lease, sub-lease or other contract between Debtor and Tri-Mack relating to bins 9, 10 and 11 at the Jeffrey Bin Site after July 15, 2004. Without a contract or lease covering bins 9, 10 and 11 from Debtor to Tri-Mack, its motion for summary judgment must fail.

6. Moreover, the timing of Tri-Mack's delivery of grain and obtaining of the Dale Jeffrey consent for storage/lien waiver is more evidence that the transaction between Tri-Mack and Debtor is a sale of grain. For instance, Dale Jeffrey did not execute the consent for storage/lien waiver until August 26, 2004, nineteen (19) days after Tri-Mack began delivering grain to the Jeffrey Site and six (6) days after delivery had ended.

7. Finally, there is a motion pending to extend the deadline for final determination of ownership interests in the grain and grain proceeds. This motion, if granted, would provide Debtor enough time to conduct discovery regarding the conflicting leases to grain bins 9, 10 and 11 at the Jeffrey bin site and the true nature of the transaction between Debtor and Tri-Mack.

8. The pending motion to extend is based partly on the Court's recognition during the August 24, 2004 hearing on Debtor's motion to establish discovery procedures, that the motion is too premature as there had not been substantial discovery.

WHEREFORE, Debtor respectfully requests that the Court deny Tri-Mack's motion for summary judgment and that the Court grant Debtor such other and further relief as is just and equitable.

Dated this 22nd day of September, 2004.

/e/ Ryan R. Dreyer
Michael S. Dove #214310
Ryan R. Dreyer #0332252
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Phone: 507-354-3111

NULIB:187193.1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Bky No. 04-60106 RJK

In re:

Daniel S. Miller,

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Plaintiff,

Adv. No. 04-6043

vs.

Daniel Altepeter, Darral Altepeter, John Altepeter, Peter Anderson, Roger Anderson, Doug Barth, Chuck Bina, Bremer Bank National Association, Monte Casavan, Gregory Driscoll, Dubuque Farming Association, Emmert Farms, Farmers Coop Grain & Seed, Kyle Haake, Roger Hagen, Russ Halverson, Gary Hoper, J & J Gust Farms, J.O. Thorson Farm, Inc., JETN Farms LLP, Gorman Johnson, Loren Johnson, Walter Johnson, Dan Juneau, Joe Juneau, Charles Kaml, Key West Farms, KO-R Farms, Inc., K-Team, Gary Larson, Lonesome Land, Matco, Inc., David McCollum, McWalter Farms, Inc., James A. Narum, Bradley Nelson, Doyle Nelson, Jeremy J. Nelson, Patrick Noll, Erik Nymann, Nymann Farms, Ose Farms a/k/a Joseph T. Ose, Burl Peckman, Gary Peckman, Pederson Brothers, Peterson Farms, PM Farming, Inc., Hans Reinhardt, Darrold Rodahl, Larry Roisland, Gary Salentiny, Dennis Salentiny, Richard Salentiny, Andrew Spaeth, John Spina, Howard Steinmetz, Matt Thorson, Ronald Thorson, Tri-Mack Potato, Inc., United Grain & Livestock, Erwin Vanek, Dan Wichterman, Steven D. Wollin and Gregory Wollin.

Defendants.

**MEMORANDUM IN OPPOSITION
TO TRI-MACK POTATO, INC.'S
MOTION FOR SUMMARY
JUDGMENT**

ARGUMENT

Generally, summary judgment is appropriate when the record shows that “there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (c) (2004).

A fact is material when it is a fact that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a motion for summary judgment the court must scrutinize the record in a light most favorable to the party against whom the motion for summary judgment was filed and against whom the judgment was rendered, and must accord that party the benefit of the doubt. *In re Gateway Center Bldg. Investors, Ltd.*, 95 B.R. 647, 656 (Bankr. D. Mo. 1989). Summary judgment should not be granted if the Court can conclude that a reasonable trier of fact could return a verdict for the non-moving party. *Liberty Lobby*, 477 U.S. at 248.

Here, summary judgment is not appropriate because there are genuine issues of material fact. First, the parties dispute the existence of a lease or sub-lease giving Tri-Mack the right to store and encumber grain in Jeffrey Bins 9, 10 and 11. Debtor entered a lease to the Jeffrey Site on August 4, 2004 that included bins 9, 10 and 11. Tri-Mack did not sub-lease, lease or contract with Debtor to store grain in bins 9, 10 and 11. If anything, Debtor and Tri-Mack made a gentleman's agreement where Tri-Mack was allowed to claim ownership of wheat in Jeffrey Bins 9, 10 and 11 for purposes of securing a CCC loan while Tri-Mack waited for settlement of the wheat with Debtor.

Second, the parties dispute the content of Jeffrey Bins 9, 10 and 11 as of the time of the CCC loan. Tri-Mack contends it owned all the wheat in Jeffrey Bins 9, 10 and 11 while Debtor has shown documentary proof that other producers deposited wheat in Jeffrey Bins 9, 10 and 11

during August 2003. More specifically, Tri-Mack contends that it delivered 14,612.71 bushels of wheat to Jeffrey Bins 9, 10 and 11 during August 2003 while Debtor contends Tri-Mack only delivered 13,927.96 bushels. Debtor has come forth with documentary proof that 5,920.67 bushels of wheat were delivered to Jeffrey Bins 9, 10 and 11 during August 2003. It is undisputed that the capacity of Jeffrey Bins 9, 10 and 11 is no more than 5,000.00 each or a total of 15,000.00 bushels. Accordingly, there is a genuine issue of fact as to whether Tri-Mack delivered 14,612.71 bushels of wheat to Jeffrey Bins 9, 10 and 11.

Clearly, Tri-Mack's motion for summary judgment should not be granted for the reasons demonstrated above, in the Objection to Summary Judgment and the Affidavit of Daniel S. Miller. Therefore, Debtor respectfully requests that the Court deny Tri-Mack's motion for summary judgment and grant Debtor such other and further relief as is just and equitable.

Dated this 22nd day of September, 2004.

/s/ Ryan R. Dreyer

Michael S. Dove #214310
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NULIB:187353.1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Bky No. 04-60106 RJK

In re:

Daniel S. Miller,

Debtor.

Daniel S. Miller,

Plaintiff,

Adv. No. 04-6043

vs.

Daniel Altepeter, Darral Altepeter, John
Altepeter, Peter Anderson, Roger Anderson,
Doug Barth, Chuck Bina, Bremer Bank
National Association, Monte Casavan,
Gregory Driscoll, Dubuque Farming
Association, Emmert Farms, Farmers Coop
Grain & Seed, Kyle Haake, Roger Hagen,
Russ Halverson, Gary Hoper, J & J Gust
Farms, J.O. Thorson Farm, Inc., JETN Farms LLP,
Gorman Johnson, Loren Johnson, Walter
Johnson, Dan Juneau, Joe Juneau, Charles
Kaml, Key West Farms, KO-R Farms, Inc.,
K-Team, Gary Larson, Lonesome Land,
Matco, Inc., David McCollum, McWalter
Farms, Inc., James A. Narum, Bradley Nelson,
Doyle Nelson, Jeremy J. Nelson, Patrick
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a/k/a Joseph T. Ose, Burl Peckman, Gary
Peckman, Pederson Brothers, Peterson
Farms, PM Farming, Inc., Hans Reinhardt,
Darrold Rodahl, Larry Roisland, Gary Salentiny,
Dennis Salentiny, Richard Salentiny, Andrew
Spaeth, John Spina, Howard Steinmetz, Matt
Thorson, Ronald Thorson, Tri-Mack Potato, Inc.,
United Grain & Livestock, Erwin Vanek, Dan
Wichterman, Steven D. Wollin and Gregory
Wollin.

Defendants.

**AFFIDAVIT OF DANIEL S.
MILLER**

COUNTY OF OTTER TAIL)

Daniel S. Miller, being first duly sworn, deposes and states as follows:

1. I am the sole principal in Danielson Grain, a sole proprietorship. The company did have a number of employees in 2003.

2. On August 4, 2003 I entered into a lease for 11 steel round grain bins with Lonnie Jeffrey, Dale Jeffrey and Robert Geddes (the "Lease"). Attached hereto and incorporated herein as Exhibit A is a true and correct copy of the Lease. The leased bins included bins 9, 10 and 11. I paid the \$3,750.00 lease payment at or about that time.

3. This is the same bin site where Tri-Mack Potato, Inc., (“Tri-Mack”) delivered grain in August 2003 and the same bin site where bins 9, 10 and 11 sit. I do not have a separate lease, sub-lease or contract with Tri-Mack regarding this bin site and they have not paid Danielson Grain anything towards the lease of this site.

4. Tri-Mack's assembly sheets demonstrate they delivered wheat from August 7 through August 29, 2003 at the Offutt and the Jeffrey bin sites. Attached hereto and incorporated herein as Exhibit B is a true and correct copy of an assembly sheet dated August 7, 2003 evincing the delivery of Tri-Mack grain to the Jeffrey and Offutt bin sites. Attached hereto and incorporated herein as Exhibit C is a true and correct copy of Danielson Grain Assembly Sheet No. 3258 dated August 11, 2003 evincing the delivery of Tri-Mack grain to the Jeffrey and Offutt bin sites.


5. All Tri-Mack wheat delivered to me is reflected in Exhibits B and C. Exhibit C is an assembly sheet showing scale tickets that total 10,000 bushels of grain. Tri-Mack delivered

and sold this wheat to Danielson Grain and Danielson Grain paid Tri-Mack on September 2, 2003. At that time, Danielson Grain considered these scale tickets settled.

6. In August or early September 2003, Donald (Sonny) Mack indicated to Danielson Grain that he wanted to encumber wheat delivered to the Jeffrey Site through a CCC loan. I agreed that he could place three bins at the Jeffrey Site under CCC loan, bins 9, 10 and 11. Those bins were filled to capacity with wheat. Bins 9, 10 and 11 had a capacity of approximately 5,000.00 bushels each. Tri-Mack did not pay Danielson Grain for lease of those bins.

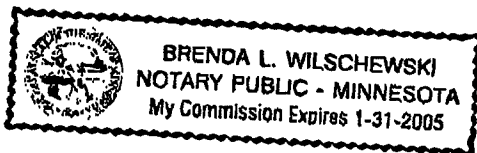
7. Tri-Mack was not the only producer to deliver wheat to Jeffrey bins 9, 10 and 11 during August of 2003. Russ Halverson, Larry Tack and Brian R. Erickson delivered wheat to Jeffrey bins 9, 10 and 11 during this time as well. Attached hereto and incorporated herein as Exhibit D are true and correct copies of scale tickets demonstrating deliveries to Jeffrey bins 9, 10 and 11 in August 2003 other than from Tri-Mack.

FURTHER YOUR AFFIANT SAYETH NOT.


Daniel S. Miller

Subscribed and sworn to before me
this 22nd day of September, 2004.


NUL18.187198.1



(FORM DD)

U. S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Daniel S. Miller

**UNSWORN DECLARATION
FOR PROOF OF SERVICE**

Debtor(s): Case Number BKY 04-60106

Daniel S. Miller,
Plaintiff,

vs.

Daniel Altepeter, et al ,
Defendants.
Case Number ADV 04-6043

Kari Gleisner, employed by Gislason & Hunter LLP, attorney(s) licensed to practice law in this court, with office address of 2700 South Broadway, P.O. Box 458, New Ulm, Minnesota 56073, declares that on September 22, 2004, I served the annexed Objection to Motion by Tri-Mack Potato, Inc. for Summary Judgment; Memorandum in Opposition to Tri-Mack Potato, Inc.'s Motion for Summary Judgment; Affidavit of Daniel S. Miller; and Proposed Order Denying Tri-Mack Potato, Inc.'s Motion for Summary Judgment upon each of the entities named below by faxing to each of them a copy thereof:

Mr. Brian F. Leonard
100 South Fifth Street
Suite 2500
Minneapolis, MN 55402-1216
Fax: 612-332-2740

Mr. Kip M. Kaler
111 Roberts Street
P. O. Box 423
Fargo, ND 58107
Fax: 701-232-0624

Mr. David C. McLaughlin
25 N.W. 2nd Street, Suite 102
Ortonville, MN 56278
Fax: 320-839-2540

U.S. Trustee
1015 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415
Fax: 612-664-5516

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: September 22, 2004

Signed: /e/ Kari Gleisner

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Bky No. 04-60106 RJK

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Defendants.

**ORDER DENYING TRI-MACK
POTATO, INC.'S MOTION
FOR SUMMARY JUDGMENT**

Tri-Mack Potato, Inc.'s motion for summary judgment in the above matter came duly and regularly on for consideration at 10:30 a.m., September 30, 2004, before United States Bankruptcy Judge Robert J. Kressell in Courtroom 8 West, United States Courthouse and Federal Building, 300 South Fourth Street, Minneapolis, Minnesota. The Court, having thereupon considered the motion, objections to the motion for summary judgment and arguments of counsel, being satisfied that motion for summary judgment is premature and unresolved factual issues exist, and good cause exists to deny the motion,

NOW, THEREFORE, IT IS ORDERED:

That Tri-Mack Potato, Inc.'s motion for summary judgment is hereby in all requests DENIED.

Dated this _____ day of _____, 2004.

Robert J. Kressell
United States Bankruptcy Judge

NULIB:187196.1